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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

SHEARSON/AMERICAN EXPRESS, INC., and MARY ANN MCNULTY,

Petitioners,

—v.—

EUGENE MCMAHON, JULIA MCMAHON, individually and as Trustees of the DAVID J. HODDER & SON, INC. EMPLOYEE PENSION PLAN; THE DAVID J. HODDER & SON PROFIT SHARING PLAN; THE LAURIE FUNERAL HOME, INC. EMPLOYEE PENSION PLAN; and THE LAURIE FUNERAL HOME PROFIT SHARING PLAN,

Respondents.

BRIEF OF *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF *CERTIORARI*

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as *Amici Curiae*

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EUGENE MCMAHON, JULIA MCMAHON, individually and as Trustees of the DAVID J. HODDER & SON, INC. EMPLOYEE PENSION PLAN; THE DAVID J. HODDER & SON PROFIT SHARING PLAN; THE LAURIE FUNERAL HOME, INC. EMPLOYEE PENSION PLAN; and THE LAURIE FUNERAL HOME PROFIT SHARING PLAN,

Respondents.

BRIEF OF *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF *CERTIORARI*

PRELIMINARY STATEMENT

The Securities Industry Association, Inc. ("SIA"), A. G. Edwards & Sons, Inc. ("A. G. Edwards"), Advest, Inc. ("Advest"), Alex. Brown & Sons Incorporated ("Alex. Brown"), Bateman Eichler, Hill Richards Incorporated ("Bateman Eichler"), The Chicago Corporation ("The Chicago Corporation"), Dean Witter Reynolds, Inc. ("Dean Witter"), Dominick & Dominick, Incorporated ("Dominick"), Goldman, Sachs & Co. ("Goldman"), Howard, Weil, Labouisse, Friedrichs Inc. ("Howard Weil"), J. C. Bradford & Co. ("J. C. Bradford"),

Johnston, Lemon & Co. Incorporated ("Johnston Lemon"), Merrill Lynch, Pierce, Fenner & Smith Incorporated ("Merrill Lynch"), Moseley Securities Corporation ("Moseley"), Nomura Securities International, Inc. ("Nomura"), Piper, Jaffray & Hopwood Incorporated ("Piper Jaffray"), Prescott, Ball & Turben, Inc. ("Prescott Ball"), Rauscher Pierce Refsnes, Inc. ("Rauscher Pierce"), Raymond, James & Associates, Inc. ("Raymond James"), and Wheat, First Securities, Inc. ("Wheat First"), submit this brief as *amici curiae* in support of the Petitioner, and urge this Court to issue a writ of *certiorari* to the United States Court of Appeals for the Second Circuit with respect to the opinion and judgment of the Second Circuit below in *McMahon* v. *Shearson/American Express, Inc.*, 788 F.2d 94 (2d Cir. 1986). Pursuant to Rule 36.1 of the Rules of this Court, the written consent of petitioners Shearson/American Express, Inc., and Mary Ann McNulty and respondents Eugene and Julia McMahon, individually and as Trustees of The David J. Hodder & Son, Inc. Employee Pension Plan, The David J. Hodder & Son Profit Sharing Plan, The Laurie Funeral Home, Inc. Employee Pension Plan, and The Laurie Funeral Home Profit Sharing Plan, has been obtained and has been filed with the Clerk of the Court.

INTEREST OF *AMICI CURIAE*

SIA is the principal trade association of the securities industry, having as members more than five hundred securities firms in the United States and Canada. As such, it has a substantial interest in the extent to which agreements to arbitrate claims between securities firms and their customers may be enforced. Because arbitration is an efficient, fair, and economical manner of resolving disputes, most of SIA's members have agreed with many of their customers to arbitrate any controversies arising between them. Among these members are *amici curiae* A. G. Edwards, Advest, Alex. Brown, Bateman Eichler, The Chicago Corporation, Dean Witter, Dominick,

Goldman, Howard Weil, J. C. Bradford, Johnston Lemon, Merrill Lynch, Moseley, Nomura, Piper Jaffray, Prescott Ball, Rauscher Pierce, Raymond James, and Wheat First.

Certain *amici* are parties to cases pending in the lower federal courts that involve one or both of the issues presented on this petition. The procedural outcome of those actions will be affected by any decision taken by this Court in this petition. *Amici curiae* therefore have a substantial interest in seeing this Court resolve whether agreements to arbitrate claims arising under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1962-64 ("RICO"), and Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (the "Exchange Act"), are enforceable as valid contracts under Section 2 of the United States Arbitration Act, 9 U.S.C. § 2 (the "Arbitration Act"). *Amici* seek to clarify and make uniform the law on these issues so that the enforceability of arbitration provisions in agreements with their customers can be predicted and relied upon. SIA has also filed briefs *amicus curiae* on these issues to this Court in *Dean Witter Reynolds Inc.* v. *Byrd*, ____ U.S. ____, 105 S. Ct. 1238 (1985) to the Second Circuit below, and to the Second, Third, Sixth, Eighth, Ninth, and Eleventh Circuits in other actions.

REASONS FOR GRANTING A WRIT OF *CERTIORARI*

SUMMARY OF ARGUMENT

The opinion of the United States Court of Appeals for the Second Circuit below, *McMahon* v. *Shearson/American Express, Inc.*, 788 F.2d 94 (2d Cir. 1986), which held that predispute arbitration agreements are unenforceable with respect to both RICO and Section 10(b) claims, reflects the suspicion courts once held of the arbitral process, *see Wilko* v. *Swan*, 346 U.S. 427 (1953), as opposed to the congressionally enacted federal policy recognizing arbitration as an efficient means of resolving disputes. *See Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth*, ____ U.S. ____, 105 S. Ct. 3346

(1985); *Southland Corp.* v. *Keating*, 465 U.S. 1 (1984); *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U.S. 1 (1983). In *McMahon*, the Second Circuit declined to apply the correct standard for determining whether RICO and Section 10(b) repealed the Arbitration Act by implication, as articulated by this Court in *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth*, *Kaiser Steel Corp.* v. *Mullins*, 455 U.S. 72 (1982), and *Morton* v. *Mancari*, 417 U.S. 535 (1974). Rather than searching for statutory language conflicting with the Arbitration Act or legislative history indicating congressional intent to repeal the Arbitration Act, as required by *Mitsubishi*, the Second Circuit overruled the substantive, congressional policies embodied in the Arbitration Act solely on the basis of its own conception of public policy.

There are at least one hundred and twenty-nine cases pending in the lower federal courts in which a motion to compel arbitration of a RICO or Section 10(b) claim has been filed.[1] The opinion of the Second Circuit, which substituted that court's policy judgments for those of Congress, can only lead lower courts to stray from the rule laid down by this Court:[2] that the Arbitration Act is valid except where *Congress* has expressed its intention, either in statutory language or legislative history, to repeal it. It may also encourage unscrupulous parties to cast ordinary broker-customer disputes in terms of RICO and Section 10(b) as a device to escape arbitration, which would frustrate the substantive rights established by the Arbitration Act.

Finally, a writ of *certiorari* is appropriate because there exists a split in the circuits. On July 9, 1986, the Eighth Circuit following this Court's analysis in *Mitsubishi* and *Southland*, held that claims arising under Section 10(b) and RICO were arbitrable and enforced a predispute agreement to arbitrate

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1 *See* Petition for *certiorari*, Appendices E and F.

2 *See, e.g., Conover* v. *Dean Witter Reynolds, Inc.*, No. 85-6082, slip op. at 5 (9th Cir. July 17, 1986).

between a broker-dealer and a public customer. *Phillips* v. *Merrill Lynch, Pierce, Fenner & Smith Incorporated*, No. 85-5156 (8th Cir. July 9, 1986). In *Phillips* the Eighth Circuit recognized the conflict among the circuits and expressed its hope that this Court would resolve the question.

Amici respectfully submit that the petition for *certiorari* should be granted in order to prevent chaos among the lower courts that are trying to define the scope and validity of the Arbitration Act.

POINT I

ARBITRATION SHOULD BE RECOGNIZED AS AN EFFICIENT AND WIDELY ACCEPTED MEANS OF RESOLVING BROKER-CUSTOMER DISPUTES IN THE SECURITIES INDUSTRY

The Second Circuit's opinion ignored the strong federal policy favoring arbitration. To the contrary, inherent in that opinion was the assumption that arbitration of RICO and Section 10(b) claims will somehow undermine substantive rights under those statutes. 788 F.2d at 98 ("[W]e have recognized the inappropriateness of the United States Arbitration Act when strong public policy considerations are involved"). This assumption is untenable as a matter of law and as a matter of fact. Federal policy, embodied in the provisions of the Arbitration Act and construed in the decisions of this Court, unequivocally favors arbitration as a means of resolving disputes. This Court observed in *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth*:

> [W]e are well past the time when judicial suspicion of the desirability of arbitration and the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution.

105 S. Ct. at 3354. *Accord Moses H. Cone Memorial Hospital* v. *Mercury Constr. Corp.*, 460 U.S. at 24 (Arbitration Act "is

a congressional declaration of a liberal federal policy favoring arbitration . . . [and] questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration"); *Southland Corp.* v. *Keating*, 465 U.S. at 10 (in passing the Arbitration Act, "Congress declared a national policy favoring arbitration . . . [that] mandated the enforcement of arbitration agreements"); *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506, 510-11 (1974). *See also Wilko* v. *Swan*, 346 U.S. at 439 (Frankfurter, J., dissenting) ("[t]here is nothing in the record . . . to indicate that the arbitral system . . . would not afford the plaintiff the rights to which he is entitled").[3]

The established structure of arbitration in the securities industry refutes the Second Circuit's assumption that the enforcement of contracts to arbitrate securities disputes is inconsistent with the protection of investors under the securities laws. Securities exchanges and the National Association of Securities Dealers, Inc. (the "N.A.S.D."), under the supervision of the Securities and Exchange Commission, provide arbitration facilities for disputes between member firms and their public customers.[4] The current procedures have evolved since 1872, when the New York Stock Exchange, Inc. first adopted arbitration procedures. The N.A.S.D. has maintained arbitration facilities for more than forty years. The exchanges and the N.A.S.D. maintain permanent arbitration staffs and have codified arbitration procedures in their rules and constitu-

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3 The language in *Mitsubishi*, *Moses Cone*, and *Southland*, which echoes Justice Frankfurter's dissenting language in *Wilko*, 346 U.S. at 439, rather than the majority's concern in *Wilko* that arbitration of Section 12(2) claims would endanger the "special rights" created thereby, 346 U.S. at 435, suggests that the policy underpinnings of *Wilko* no longer retain the same force as when *Wilko* was decided.

4 *See, e.g.*, 2 Am. Stock Ex. Guide (CCH) ¶ 9542 (Rule 602); N.A.S.D. Manual (CCH) ¶ 3701; 2 N.Y.S.E. Guide (CCH) ¶ 2600 (Rule 600); Uniform Code of Arbitration § 1, *reprinted in* Fifth Report of the Securities Industry Conference on Arbitration, (April 1986) (Exhibit C).

tions.[5] The current arbitration procedures were proposed by the Securities Industry Committee on Arbitration and adopted by the exchanges and the N.A.S.D. Moreover, the Securities and Exchange Commission has approved the implementation and operation of this arbitral system, *see* SEC Securities Exchange Act Release No. 16390 (Nov. 30, 1979), 18 S.E.C. Docket 1197 (1979), and retains jurisdiction to monitor the fairness of arbitration proceedings. *See* Section 19 of the Exchange Act, 15 U.S.C. § 78s.

The arbitration rules further ensure that arbitration practice in the securities industry will be efficient and impartial. For example, these rules require that panels of arbitrators include members of the securities industry and of the public.[6] Those rules require a majority of "public" arbitrators (i.e., unaffiliated with member firms) in disputes between public customers and member firms.[7] Arbitrators are required to disclose any business affiliation with any parties before them, and may be disqualified for cause for even the appearance of a conflict of interest.[8] Moreover, each party in an arbitration has at least

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5 *See, e.g.*, Constitution of the New York Stock Exchange, Inc., Art. VIII, 2 N.Y.S.E. Guide (CCH) ¶¶ 1351-1357; Rules 600-634 of the New York Stock Exchange, Inc., *id.* ¶¶ 2600-2634; Uniform Code of Arbitration Procedure of the National Association of Securities Dealers, Inc., N.A.S.D. Manual (CCH) ¶¶ 3701-3743; Arbitration Rules of the American Stock Exchange, Inc., 2 Am. Stock Ex. Guide (CCH) ¶¶ 9540-9551J. The Uniform Code of Arbitration is annexed hereto as Appendix A. Copies of the American Stock Exchange, Inc. Arbitration Rules, the New York Stock Exchange, Inc. Arbitration Rules, and the Uniform Code of Arbitration of the National Association of Securities Dealers, Inc. are contained in Parts I, II, and III of the Supplemental Lodging of *Amici Curiae*, respectively.

6 *See, e.g.*, 2 Am. Stock Ex. Guide (CCH) ¶ 9541 (Rule 601); N.A.S.D. Manual (CCH) ¶ 3719; 2 N.Y.S.E Guide (CCH) ¶ 2607 (Rule 607); Uniform Code of Arbitration § 8.

7 *See, e.g.*, 2 Am. Stock Ex. Guide (CCH) ¶ 9542 (Rule 602); N.A.S.D. Manual (CCH) ¶ 3719; 2 N.Y.S.E. Guide (CCH) ¶ 2607 (Rule 607); Uniform Code of Arbitration § 8.

8 *See, e.g.*, 2 Am. Stock Ex. Guide (CCH) ¶ 9542(f) (Rule 602(f)); N.A.S.D. Manual (CCH) ¶ 3723; 2 N.Y.S.E. Guide (CCH) ¶ 2610 (Rule 610); Uniform Code of Arbitration § 11.

one peremptory challenge.[9] The fairness of these rules and procedures is borne out by the results of arbitrations conducted under them. In 1985, 55% of public customer cases that went to arbitration before one of the stock exchanges or the N.A.S.D. and were decided—rather than being settled—awarded damages to the customer.[10]

The long established competence of securities industry arbitrators to adjudicate disputes should dispel any suspicion of the arbitral process. The stock exchanges and the N.A.S.D. maintain lists of senior securities industry personnel, attorneys and other professionals from outside the industry, but who are well versed in the field, from which a particular panel may be drawn.[11] Most have previously served as arbitrators and are therefore well acquainted with arbitration procedures and customs. Indeed, the federal courts have recognized securities industry arbitrators as qualified to resolve Section 10(b) and RICO claims. For example, courts have long compelled arbitration of Section 10(b) disputes between members of a securities exchange or the N.A.S.D. *See, e.g., Axelrod & Co.* v. *Kordich, Victor & Neufeld*, 320 F. Supp. 193 (S.D.N.Y. 1970), *aff'd*, 451 F.2d 838 (2d Cir. 1971); *Brown* v. *Gilligan, Will & Co.*, 287 F. Supp. 766, 772 (S.D.N.Y. 1968). Claims under Section 10(b) routinely have been arbitrated in those instances when the public customer chose to arbitrate. *Gardner* v. *Shearson, Hammill & Co.*, 433 F.2d 367 (5th Cir. 1970) (per curiam), *cert. denied*, 401 U.S. 978 (1971); *Moran* v. *Paine, Webber, Jackson & Curtis*, 389 F.2d 242 (3d Cir. 1968); *cf. AVC Nederland B.V.* v. *Atrium Inv. Partnership*, 740 F.2d 148 (2d Cir. 1984) (affirming the dismissal of a Section 10(b) claim

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9 *See, e.g.*, Uniform Code of Arbitration § 10.

10 Fifth Report of the Securities Industry Conference on Arbitration, Statistical Report (April 1986) (Exhibit A). A copy of the Statistical Report is annexed hereto as Appendix C.

11 *See, e.g.*, Panel of Arbitrators 1986-1987, 1 Am. Stock Ex. Guide (CCH) 157-59; N.A.S.D. Manual (CCH) ¶ 3702. A copy of the American Stock Exchange, Inc. Panel of Arbitrators is contained in Part IV of the Supplemental Lodging of *Amici Curiae*.

because the parties had agreed to try all disputes in the Netherlands).

Moreover, the arbitration process significantly reduces discovery expenses and minimizes delay in reaching a hearing. *See* C. Katsoris, *The Arbitration of a Public Securities Dispute*, 53 Fordham L. Rev. 279, 286 (1984). For example, state laws generally provide subpoena power to arbitrators and counsel, and parties are encouraged to produce documents "to the fullest extent possible without resort to the issuance of the subpoena process."[12] Arbitrators may also direct the appearance of persons associated with member organizations or the production of records of these organizations without using the subpoena process.[13] That most stock exchanges and the N.A.S.D. offer a streamlined arbitration procedure for smaller claims also enables customers to resolve small disputes without incurring great expense.[14] According to statistics compiled by the Securities Industry Conference on Arbitration, nearly 2800 securities industry arbitrations were filed with stock exchanges and the N.A.S.D. in 1985, and 2190 arbitrations in the securities industry were resolved during that year.[15] The 1985 figures show that more than twice the number of arbitrations were filed that year than in 1982.[16]

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12 *See, e.g.*, 2 Am. Stock Ex. Guide (CCH) ¶ 9548 (Rule 608); N.A.S.D. Manual (CCH) ¶ 3732; 2 N.Y.S.E. Guide (CCH) ¶ 2619 (Rule 619); Uniform Code of Arbitration § 20; C. Katsoris, *supra*, at 286.

13 *See, e.g.*, 2 Am. Stock Ex. Guide (CCH) ¶ 9549 (Rule 609); N.A.S.D. Manual (CCH) ¶ 3733; 2 N.Y.S.E. Guide (CCH) ¶ 2620 (Rule 620); Uniform Code of Arbitration § 21.

14 *See, e.g.*, 2 Am. Stock Ex. Guide ¶ 9551H (Rule 619); N.A.S.D. Manual (CCH) ¶ 3710; 2 N.Y.S.E. Guide ¶ 2601 (Rule 601); Uniform Code of Arbitration § 2.

15 *See* Fifth Report of the Securities Industry Conference on Arbitration, Statistical Report (April 1986) (Exhibit A).

16 The number of filings rose from 1340 in 1982 to 2796 in 1985. *See id.*

Any lingering suspicion as to the efficiency and fairness of arbitration as a means of resolving disputes arising under Section 10(b) or RICO are laid to rest by the history of *Phillips* v. *Merrill Lynch, Pierce, Fenner & Smith Inc.*, No. 85-5156 (8th Cir. July 9, 1986). There, following this Court's decision in *Dean Witter Reynolds Inc.* v. *Byrd*, plaintiff's state and common law claims were referred to arbitration. That arbitration was concluded in September, 1985, with an award in favor of plaintiff in the amount of $1,500,000. The award was confirmed by judgment of the district court and has been paid. Had plaintiff's claims under Section 10(b) and RICO—based on the same facts as the state and common law claims—been referred to arbitration, those claims too would now have been resolved. As it stands, the district court declined to refer those claims to arbitration and was reversed by the Eighth Circuit. Plainly, the arbitrators in *Phillips* were well able to resolve the factual dispute presented to them.

Finally, the excessive caseload in the federal district courts makes it all the more important that arbitrable claims between securities firms and their customers proceed to arbitration. Filings of securities and commodities claims have steadily increased, reaching 3266 in 1985.[17] Filings of RICO civil actions have risen as well, from 42 in November, 1985, to 99 in April, 1986.[18] Referring Section 10(b) and RICO claims to arbitration will simultaneously expedite resolution of those disputes and help relieve the federal courts of their overloaded dockets, allowing those claims remaining in federal court to be adjudicated more speedily.

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17 Annual Report of the Director of the Administrative Office of the United States Courts, Table 19 (1985). These figures are calculated on the basis of a year beginning July 1. "1985" statistics therefore refer to the period July 1, 1984, through June 30, 1985. A copy of Table 19 is annexed hereto as Appendix B.

18 Communication from the Administrative Office of the United States Courts, Statistical Analysis and Reports Division.

POINT II

THE SECOND CIRCUIT'S OPINION ON RICO IGNORED THE STANDARD FOR FINDING AN IMPLIED REPEAL OF THE UNITED STATES ARBITRATION ACT

By holding that RICO claims are not arbitrable on the basis of its own conception of public policy, the Second Circuit usurped Congress's role in setting federal policy. In so doing, the Second Circuit ignored the express directives of this Court in prior rulings, in particular *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth*. *Mitsubishi* requires that any finding of an implied repeal of the Arbitration Act be supported by "congressional intention expressed in some other statute . . . ." 105 S. Ct. at 3355. This is simply a reiteration of the traditional standard for finding that a federal statute has been repealed by implication by a subsequently enacted federal statute. *Kaiser Steel Corp.* v. *Mullins*, 455 U.S. at 88 (" 'repeals by implication [of a prior statute by a subsequently enacted one] are disfavored' ") (quoting *Allen* v. *McCurry*, 449 U.S. 90, 99 (1980)); *Morton* v. *Mancari*, 417 U.S. at 550 ("In the absence of some affirmative showing of an intention [by Congress] to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable").

In *Mitsubishi*, this Court stated:

> We must assume that if Congress intended the substantive protection afforded by a given statute to include protection against waiver of the right to a judicial forum, that intention will be deducible from text or legislative history.

105 S. Ct. at 3355. Under this test, there can be no question that predispute agreements to arbitrate RICO claims are enforceable under the Arbitration Act. RICO contains no statutory language that restricts a party's ability to choose an arbitral forum with respect to RICO claims. Nor is there any evidence in the legislative history of RICO that Congress

intended to repeal the Arbitration Act with respect to RICO claims. Absent such evidence, the Arbitration Act must apply to RICO claims and agreements to arbitrate those claims must be honored as ordinary contracts.

The Second Circuit did not pretend to apply the *Mitsubishi* test. It cited no statutory text or legislative history to support a repeal of the Arbitration Act. Instead, it based its holding on "the inappropriateness of the United States Arbitration Act when strong public policy considerations"—never identified further—"are involved". 788 F.2d at 98.[19] It made no attempt to balance these "strong public policy considerations" with the express congressional policies embodied in the Arbitration Act, policies that this Court has often recognized. *E.g.*, *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth*, 105 S. Ct. at 3354; *Southland Corp.* v. *Keating*, 465 U.S. at 10; *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U.S. at 24-25; *Scherk* v. *Alberto-Culver Corp.*, 417 U.S. at 510-11. Far from finding a statutory or legislative basis for an implied repeal of the Arbitration Act with respect to RICO claims, the Second Circuit substituted its own policy judgment for the congressional policy embodied in the Arbitration Act.

Under the *Mitsubishi* test, there can be no implied repeal of the Arbitration Act for RICO claims. The judgment below should be reversed.

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19 The Second Circuit's attempt to apply to RICO its antitrust decision in *American Safety Equipment Corp.* v. *J.P. Maguire & Co.*, 391 F.2d 821 (2d Cir. 1968) (holding that antitrust law claims are not subject to predispute arbitration agreements), ignores the "skepticism" this Court expressed about *American Safety* in *Mitsubishi*. 105 S. Ct. at 3357. The Court's criticism of *American Safety* in *Mitsubishi* precludes its application to RICO claims. The only *American Safety* consideration that this Court recognized as valid was "the fundamental importance to American democratic capitalism of the regime of the antitrust laws." *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth*, 105 S. Ct. at 3358. That consideration has no parallel in RICO, especially in its civil aspect, which, as this Court has noted, "is evolving into something quite different from the original conception of its enactors." *Sedima, S.P.R.L.* v. *Imrex Co.*, ___ U.S. ___, 105 S. Ct. 3275, 3287 (1985).

POINT III

THE SECOND CIRCUIT FAILED TO REEXAMINE ITS EXTENSION OF *WILKO* v. *SWAN* TO CLAIMS ARISING UNDER SECTION 10(b) OF THE SECURITIES EXCHANGE ACT OF 1934 IN LIGHT OF THIS COURT'S OPINIONS IN *SCHERK* v. *ALBERTO-CULVER CO.*, *DEAN WITTER REYNOLDS INC.* v. *BYRD*, AND *MITSUBISHI MOTORS CORP.* v. *SOLER CHRYSLER-PLYMOUTH*

As with its RICO holding, the Second Circuit extended the rule of *Wilko* v. *Swan* to cover Section 10(b) claims without the requisite showing under *Mitsubishi* that Congress intended to repeal the Arbitration Act with respect to such claims. *Wilko* ruled that a party asserting a claim under Section 12(2) of the Securities Act of 1933, 15 U.S.C. § 77*l*(2) (the "Securities Act"), could not be compelled to submit his claim to arbitration pursuant to a predispute arbitration agreement because Section 14 of the Securities Act, 15 U.S.C. § 77n, which voids any agreement to waive compliance with that Act, repealed the Arbitration Act by implication with respect to Section 12(2) claims. The Court expressed concern that arbitrators would be unfamiliar with the "special right" expressly created by Section 12(2), a right that differed significantly from a traditional action for common law fraud. It further observed that Section 22 of the Securities Act, 15 U.S.C. § 77v, confers jurisdiction on all courts, federal and state, to hear Securities Act claims.

Yet, as Justice White observed in his concurring opinion in *Byrd*, the reasoning of *Wilko* "cannot be mechanically transplanted to" Section 10(b) claims, and *Wilko*'s applicability to Section 10(b) claims "is a matter of substantial doubt." 105 S. Ct. at 1244. Although the Exchange Act contains a non-waiver provision similar to Section 14 of the Securities Act, its applicability to an implied cause of action under Section 10(b), as opposed to an express private right of action like Section 12(2), is far from clear. Unlike the "special right" under

Section 12(2), a Section 10(b) claim closely resembles a traditional common law fraud action. *Dean Witter Reynolds Inc.* v. *Byrd*, ____ U.S. ____, 105 S. Ct. 1238, 1244 (1985) (White, J., concurring).

Moreover, the *Wilko* decision expressed a deep suspicion of the arbitral system as being unable to enforce the Section 12(2) "special rights." Since "we are well past [such] judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals," *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth*, 105 S. Ct. at 3354, there is no reason to extend *Wilko* to the Exchange Act, much less to the implied cause of action under Section 10(b).

The Second Circuit, in its decision below, ignored the fundamental differences between Section 10(b) and Section 12(2) that this Court identified in *Byrd* and *Scherk*. The court also failed to scrutinize the legislative history of Section 10(b) and RICO for evidence supporting a congressional intent to repeal the Arbitration Act as *Mitsubishi*, *Morton* v. *Mancari*, and *Kaiser Steel Corp.* v. *Mullins* command. It paid no heed to the substantive policies underlying the Arbitration Act that were expressed in *Mitsubishi*, *Moses H. Cone*, and *Southland*. Instead it relied upon a generalized policy argument of its own making, that "[t]he securities laws generally, and the implied causes of action which the Courts have recognized, are designed to protect the public." 788 F.2d at 98. Once again, the Second Circuit failed to analyze the issue as framed by this Court. Instead of searching for congressional intent to repeal the Arbitration Act, it imposed its own policy judgments on the congressionally enacted Arbitration Act.

Although it recognized that this Court has twice stated that the applicability of the Arbitration Act to the implied private right of action under Section 10(b) is an open question, *Dean Witter Reynolds Inc.* v. *Byrd*, 105 S. Ct. at 1240 n.1, 1244 (White, J., concurring), and *Scherk* v. *Alberto-Culver Co.*, 417 U.S. at 506, the Second Circuit refused to examine that issue anew in light of this Court's recent decisions concerning the Arbitration Act:

> Although *Scherk* and *Byrd* may cast some doubt on whether the Supreme Court, if presented with the issue, would hold claims under § 10(b) and Rule 10b-5 to be non-arbitrable, it would be improvident for us to disregard clear judicial precedent in this Circuit based on mere speculation. We think that the orderly administration of justice will be best served if we as one of the inferior courts follow Supreme Court precedent and adhere to the settled law of this Circuit . . . .

788 F.2d at 98. In other words, rather than reassessing its prior decisions in light of *Scherk*, *Byrd*, and *Mitsubishi*, the Second Circuit blindly adhered to its own earlier authority and invited this Court to review the case if it saw fit.[20]

POINT IV

THE CIRCUITS STAND IN CONFLICT AS TO THE ARBITRABILITY OF CLAIMS ARISING UNDER SECTION 10(b) AND RICO

A direct conflict now exists among the Circuits with respect to whether a predispute agreement to arbitrate claims arising under Section 10(b) and RICO is enforceable. On July 9, 1986, the Eighth Circuit, following this Court's analysis in *Mitsubishi* and *Southland*, held that the Arbitration Act required enforcement of a predispute agreement to arbitrate where plaintiff alleged violations of Section 10(b) and RICO. *Phillips* v. *Merrill Lynch, Pierce, Fenner & Smith Incorporated*, No. 85-5156 (8th Cir. July 9, 1986).

As the Eighth Circuit noted, its decision directly conflicts with the decision of the Second Circuit below and that of the Eleventh Circuit in *Miller* v. *Drexel Burnham Lambert, Inc.*, No. 85-5692 (11th Cir. June 17, 1986). Subsequently, the Ninth

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20 That the applicability of *Wilko* to Section 10(b) claims was "the settled law of [the Second] Circuit" is not entirely clear. *Cf. AVC Nederland B.V.* v. *Atrium Inv. Partnership*, 740 F.2d at 157.

Circuit followed the Second and Eleventh Circuits in *Conover* v. *Dean Witter Reynolds, Inc.*, No. 85-6082 (9th Cir. July 17, 1986). That conflict can only be resolved by this Court. A failure to reach a prompt resolution of the issue will only result in uneven enforcement of the Arbitration Act and will unnecessarily clog the lower federal courts with numerous cases that should be arbitrated.

CONCLUSION

For the reasons set forth above, *amici* the Securities Industry Association, Inc., A. G. Edwards & Sons, Inc., Advest, Inc., Alex. Brown & Sons Incorporated, Bateman Eichler, Hill Richards Incorporated, The Chicago Corporation, Dean Witter Reynolds, Inc., Dominick & Dominick, Incorporated, Goldman, Sachs & Co., Howard, Weil, Labouisse, Friedrichs Inc., J. C. Bradford & Co., Johnston, Lemon & Co. Incorporated, Merrill Lynch, Pierce, Fenner & Smith Incorporated, Moseley Securities Corporation, Nomura Securities International, Inc., Piper, Jaffray & Hopwood Incorporated, Prescott, Ball & Turben, Inc., Rauscher Pierce Refsnes, Inc., Raymond, James & Associates, Inc., and Wheat, First Securities, Inc., respectfully request that the petition for a writ of *certiorari* be granted.

Dated: August 12, 1986

Respectfully submitted,

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APPENDICES

APPENDIX A

TEXT OF UNIFORM CODE OF ARBITRATION AS ADOPTED BY THE PARTICIPATING ORGANIZATIONS

SECURITIES INDUSTRY ON ARBITRATION CONFERENCE

Reprinted in Fifth Report of the
Securities Industry Conference on Arbitration
(April 1986)
(Exhibit C)

SECTION 1. ARBITRATION

(a) Any dispute, claim or controversy between a (customer or non-member) and a (member, allied member, member organization and/or associated person) arising in connection with the business of such (member, allied member, member organization and/or associated person) in connection with his activities as an associated person shall be arbitrated under the Constitution and Rules of the (name of self-regulatory organization) as provided by any duly executed and enforceable written agreement or upon the demand of the customer or non-member.

(b) Under this Code, the (name of self-regulatory organization) shall have the right to decline the use of its arbitration facilities in any dispute, claim or controversy, where—having due regard for the purposes of the (name of self-regulatory organization) and the intent of this Code—such dispute, claim or controversy is not a proper subject matter for arbitration.

SECTION 2. SIMPLIFIED ARBITRATION

(a) Any dispute, claim or controversy, arising between a public customer(s) and an associated person or a

member subject to arbitration under this Code involving a dollar amount not exceeding $5,000, exclusive of attendant costs and interest, shall, upon demand of the customer(s) or by written consent of the parties, be arbitrated as hereinafter provided.

(b) The claimant shall file with the Director of Arbitration one (1) executed Submission Agreement and one (1) copy of the Statement of Claim of the controversy in dispute, together with documents in support of the claim. The Statement of Claim shall specify the relevant facts, the remedies sought and whether or not a hearing is demanded.

(c) The Claimant shall pay the sum of $15.00 if the amount in controversy is $1,000 or less, $25 if the amount in controversy is more than $1,000 but does not exceed $2,500, or $100 if the amount in controversy is more than $2,500, but does not exceed $5,000 upon filing of the Submission Agreement. The final disposition of this sum shall be determined by the arbitrator.

(d) The Director of Arbitration shall endeavor to serve promptly, by mail or otherwise, on the Respondent(s) one (1) copy of the Submission Agreement and one (1) copy of the Statement of Claim. The Respondent(s) shall, within twenty (20) calendar days from receipt of service, file with the Director of Arbitration one (1) executed Submission Agreement and one (1) copy of the Respondent's answer, together with supporting documents. The Answer shall designate all available defenses to the claim and may set forth any related counterclaim and/or related Third Party Claim the Respondent(s) may have against the Claimant or any other person. If the Respondent(s) has interposed a Third Party Claim, the Director of Arbitration shall endeavor to serve promptly by mail or otherwise a copy of the same, together with a copy of the Submission Agreement

on such Third Party, who shall respond in the manner herein provided for response to the Claim. If the Respondent(s) files a related counterclaim exceeding $5,000, the arbitrator may refer the claim, counterclaim and/or Third Party Claim, if any, to a panel of three (3) or five (5) arbitrators in accordance with Section 19 of this Code, or, may dismiss the Counterclaim and/or Third Party Claim, without prejudice to the Counterclaimant(s) and/or Third Party Claimant(s) pursuing the Counterclaim and/or Third Party Claim in a separate proceeding.

(e) The Director of Arbitration shall endeavor to serve promptly by mail or otherwise on the Claimant a copy of the Answer, Counterclaim, Third Party Claim or other responsive pleading, if any. The Claimant, if a Counterclaim is asserted against him, shall within ten (10) calendar days either (i) file a Reply to any Counterclaim with the Director of Arbitration who will serve a copy of the Reply on the Respondent(s) or, (ii) if the amount of the Counterclaim exceeds the Claim, shall have the right to file a statement withdrawing the Claim. If the Claimant withdraws the Claim, the proceedings will be discontinued without prejudice to the rights of the parties.

(f) The dispute, claim or controversy shall be submitted to a single arbitrator knowledgeable in the securities industry selected by the Director of Arbitration. Unless the public customer demands or consents to a hearing, or the arbitrator calls a hearing, the arbitrator shall decide the dispute, claim or controversy solely upon the pleadings and evidence filed by the parties. If a hearing is necessary, such hearing shall be held as soon as practicable at a locale selected by the Director of Arbitration.

(g) The Director of Arbitration may grant extensions of time to file any pleading upon a showing of good cause.

(h) The arbitrator shall be authorized to require the submission of further documentary evidence as he, in his sole discretion, deems advisable.

(i) Upon the request of the arbitrator, the Director of Arbitration shall appoint two (2) additional arbitrators to the panel which shall decide the matter in controversy.

(j) In any case where there is more than one (1) arbitrator, the majority will be public arbitrators.

(k) In his discretion, the arbitrator may, at the request of any party, permit such party to submit additional documentation relating to the pleadings.

(l) Except as otherwise provided herein, the general arbitration rules of the (name of self-regulatory organization) shall be applicable to proceedings instituted under this Code.

SECTION 3. HEARING REQUIREMENTS—WAIVER OF HEARING

(a) Any dispute, claim or controversy, except as provided in Section 2 (Simplified Arbitration), shall require a hearing unless all parties waive such hearing in writing and request that the matter be resolved solely upon the pleadings and documentary evidence.

(b) Notwithstanding a written waiver of a hearing by the parties, a majority of the arbitrators may call for and conduct a hearing. In addition, any arbitrator may request the submission of further evidence.

SECTION 4. TIME LIMITATION UPON SUBMISSION

No dispute, claim or controversy shall be eligible for submission to arbitration under this Code where six (6) years shall have elapsed from the occurrence or event giving rise to the act or the dispute, claim or controversy. This section shall not

extend applicable statutes of limitation, nor shall it apply to any case which is directed to arbitration by a court of competent jurisdiction.

SECTION 5. DISMISSAL OF PROCEEDINGS

At any time during the course of an arbitration, the arbitrators may, either upon their own initiative or at the request of a party, dismiss the proceeding and refer the parties to the remedies provided by law. The arbitrators shall, upon the joint request of the parties, dismiss the proceedings.

SECTION 6. SETTLEMENTS

All settlements upon any matter submitted shall be at the election of the parties.

SECTION 7. TOLLING OF TIME LIMITATION(S) FOR THE INSTITUTION OF LEGAL PROCEEDINGS AND EXTENSION OF TIME LIMITATION(S) FOR SUBMISSION OF ARBITRATION

(a) Where permitted by law, the time limitation(s) which would otherwise run or accrue for the institution of legal proceedings shall be tolled when a duly executed Submission Agreement is filed by the Claimant(s). The tolling shall continue for such period as the (name of self-regulatory organization) shall retain jurisdiction upon the matter submitted.

(b) The six (6) year time limitation upon submission to arbitration shall not apply when the parties have submitted the dispute, claim or controversy to a court of competent jurisdiction. The six (6) year time limitation shall not run for such period as the court shall retain jurisdiction upon the matter submitted.

SECTION 8. DESIGNATION OF THE NUMBER OF ARBITRATORS

(a) Public Controversies

(1) Except as otherwise provided in this Code, in all arbitration matters involving public customers, and where the matter in controversy does not exceed the amount of $500,000, or where the matter in controversy does not involve or disclose a money claim, the Director of Arbitration shall appoint an arbitration panel which shall consist of no less than three (3) nor more than five (5) arbitrators, at least a majority of whom shall not be from the securities industry, unless the public customer requests a panel consisting of at least a majority from the securities industry.

(2) In all arbitration matters involving public customers where the amount in controversy is $500,000 or more, the Director of Arbitration shall appoint an arbitration panel which shall consist of five (5) arbitrators, unless the parties agree in writing to a panel of three (3) arbitrators, at least a majority of whom shall not be from the securities industry, unless the public customer requests a panel consisting of at least a majority from the securities industry.

(b) Composition of Panels

The individuals who serve on a particular arbitration panel shall be determined by the Director of Arbitration. The Director of Arbitration may name the chairman of each panel.

SECTION 9. NOTICE OF SELECTION OF ARBITRATORS

The Director of Arbitration shall inform the parties of the names and business affiliations of the arbitrators at least eight (8) business days prior to the date fixed for the initial hearing session.

SECTION 10. CHALLENGES

In any arbitration proceeding, each party shall have the right to one peremptory challenge. In arbitrations where there are multiple Claimants, Respondents and/or Third Party Respondents, the Claimants shall have one peremptory challenge, the Respondents shall have one peremptory challenge and the Third Party Respondents shall have one peremptory challenge, unless the Director of Arbitration determines that the interests of justice would best be served by awarding additional peremptory challenges. Unless extended by the Director of Arbitration, a party wishing to exercise a peremptory challenge must do so by notifying the Director of Arbitration in writing within five (5) business days of notification of the identity of the persons named to the panel. There shall be unlimited challenges for cause.

SECTION 11. DISCLOSURES REQUIRED OF ARBITRATORS

Each arbitrator shall be required to disclose to the Director of Arbitration any circumstances which might preclude such arbitrator from rendering an objective and impartial determination. Prior to the commencement of the first hearing session, the Director of Arbitration may remove an arbitrator who discloses such information. The Director of Arbitration shall also inform the parties of any information disclosed pursuant to this section if the arbitrator who disclosed information is not removed.

SECTION 12. DISQUALIFICATION OR OTHER DISABILITY OF ARBITRATORS

In the event that any arbitrator, after the commencement of the first session but prior to the rendition of the award, should become disqualified, resign, die, refuse or be unable to perform or discharge his duties, the Director of Arbitration, upon such proof as he deems satisfactory, shall, where permitted by law, either: (a) appoint a new member to the panel to replace

such arbitrator, obtaining the consent of the parties; or (b) with the consent or waiver of the parties, direct that the arbitration proceed without the substitution of a new arbitrator.

SECTION 13. INITIATION OF PROCEEDINGS

Except as otherwise provided herein, an arbitration proceeding under this Code shall be instituted as follows:

(a) Statement of Claim

The Claimant shall file with the Director of Arbitration three (3) executed copies of the Submission Agreement and three (3) copies of the Statement of Claim of the controversy in dispute, together with the documents in support of the claim. The Statement of Claim should specify the relevant facts and the remedies sought. The Director of Arbitration shall endeavor to serve promptly by mail or otherwise on the Respondent(s) one (1) copy of the Submission Agreement and one (1) copy of the Statement of Claim.

(b) Answers—Defenses, Counterclaims and/or Cross-claims

(1) The Respondent(s) shall within twenty (20) business days from receipt of service file with the Director of Arbitration one (1) executed Submission Agreement and one (1) copy of the Respondent's(s') Answer. The Answer shall specify all available defenses and relevant facts that will be relied upon at the hearing and may set forth any related Counterclaim the Respondent(s) may have against the Claimant and any Third Party Claim against any other party or person upon any existing dispute, claim or controversy to arbitration under this Code.

(2) (i) Respondent, Responding Claimant, Cross-Claimant or Third Party Respondent who pleads only a general denial as an answer may, upon written objection by the adversary party

before the hearing to the Director of Arbitration, in the discretion of the arbitrators, be barred from presenting any facts or defenses at the time of the hearing.

(ii) A Respondent, Responding Claimant, Cross-Claimant or Third Party Respondent who fails to specify all available defenses and relevant facts in such party's answer may, upon objection by the adversary party, in the discretion of the arbitrators, be barred from presenting the facts or defenses not included in such party's answer at the hearing.

(iii) A Respondent, Responding Claimant, Cross-Claimant or Third Party Respondent who fails to file an answer within twenty (20) business days from receipt of service, or unless the time to answer has been extended pursuant to paragraph (5), may, in the discretion of the arbitrators, be barred from presenting any matter, arguments or defenses at the hearing.

(3) If the Respondent(s) has interposed a Third Party Claim, the Director of Arbitration shall endeavor to serve promptly by mail or otherwise a copy of the same together with a copy of the Submission Agreement on such Third Party, who shall respond in the manner provided for response to the Claim.

(4) The Director of Arbitration shall endeavor to serve promptly by mail or otherwise on the claimant a copy of the Answer, Counterclaim, Third Party Claim or other responsive pleading, if any. The Claimant may within ten (10) business days file a Reply to the Counterclaim with the Director of Arbitration, who will serve a copy of the Reply on the Respondent(s).

(5) The time period to file any pleading, whether such be denominated as a Claim, Answer, Counterclaim, Reply or Third Party Pleading, may be extended for such further periods as may be granted by the Director of Arbitration.

(c) Joining and Consolidation

(1) With respect to any dispute, claim or controversy submitted to arbitration, any party or person eligible to submit a claim under this Code shall have the right to proceed in the same arbitration against any other party or person upon any claim directly related to such dispute.

(2) For purposes of this subsection, the Director of Arbitration shall be authorized to determine preliminarily whether a claim is directly related to the matter in dispute and to join any other party to the dispute and to consolidate the matter for hearing and award purposes. In arbitrations where there are multiple Claimants, Respondents and/or Third Party Respondents, the Director of Arbitration shall be authorized to determine preliminarily whether such parties should proceed in the same or separate arbitrations.

(3) All final determinations with respect to joining, consolidation and multiple parties under this subsection shall be made by the arbitration panel.

SECTION 14. DESIGNATION OF TIME AND PLACE OF HEARINGS

Unless the law directs otherwise, the time and place for the initial hearing shall be determined by the Director of Arbitration and each hearing thereafter by the arbitrators. Notice of the time and place for the initial hearing shall be given at least eight (8) business days prior to the date fixed for the hearing by

personal service, registered or certified mail to each of the parties unless the parties shall, by their mutual consent, waive the notice provisions under this section. Notice for each hearing, thereafter, shall be given as the arbitrators may determine. Attendance at a hearing waives notice thereof.

SECTION 15. REPRESENTATION BY COUNSEL

All parties shall have the right to representation by counsel at any stage of the proceedings.

SECTION 16. ATTENDANCE AT HEARINGS

The attendance or presence of all persons at hearings, including witnesses, shall be determined by the arbitrators. However, all parties to the arbitration and their counsel shall be entitled to attend all hearings.

SECTION 17. FAILURE TO APPEAR

If any of the parties, after due notice, fails to appear at a hearing or any adjourned hearing session, the arbitrators may, in their discretion, proceed with the arbitration of the controversy. In such cases, all awards shall be rendered as if each party had entered an appearance in the matter submitted.

SECTION 18. ADJOURNMENTS

(a) The arbitrators may, in their discretion, adjourn any hearing(s) either upon their own initiative or upon the request of any party to the arbitration.

(b) A party requesting an adjournment after arbitrators have been appointed, if said adjournment is granted, shall pay a fee equal to the deposit of costs but not more than $100. The arbitrators may waive this fee or in their awards may direct the return of this adjournment fee. This provision shall not apply to matters filed under Section 2 of the Code.

SECTION 19. ACKNOWLEDGMENT OF PLEADINGS

The arbitrators shall acknowledge to all parties present that they have read the pleadings filed by the parties.

SECTION 20. SUBPOENA PROCESS

(a) The arbitrators and any counsel of record to the proceedings shall have the power of the subpoena process as provided by law. However, the parties shall produce witnesses and present proofs to the fullest extent possible without resort to the issuance of the subpoena process.

(b) Prior to the first hearing session, the parties shall cooperate in the voluntary exchange of such documents and information as will serve to expedite the arbitration. If the parties agree, they may also submit additional documents to the Director of Arbitration for forwarding to the arbitrators.

SECTION 21. POWER TO DIRECT APPEARANCES

The arbitrators shall be empowered without resort to the subpoena process to direct the appearance of any person employed or associated with any member or member organization of the (name of self-regulatory organization) and/or the production of any records in the possession or control of such persons, members or member organizations. Unless the arbitrators direct otherwise, the party requesting the appearance of a person or the production of documents under this section shall bear all reasonable costs of such appearance and/or production.

SECTION 22. EVIDENCE

The arbitrators shall determine the materiality and relevance of any evidence proffered and shall not be bound by rules governing the admissibility of evidence.

SECTION 23. INTERPRETATION OF THE CODE

The arbitrators shall be empowered to interpret and determine the applicability of all provisions under this Code of which interpretation shall be final and binding upon the parties.

SECTION 24. DETERMINATIONS OF ARBITRATORS

All rulings and determinations of the panel shall be a majority of the arbitrators.

SECTION 25. RECORD OF PROCEEDINGS

Unless requested by the arbitrators or a party or parties to a dispute, no record of an arbitration proceeding shall be kept. If the record is kept, it shall be a verbatim record. If a party or parties to a dispute elect to have the record transcribed, the cost of such transcription shall be borne by the party or parties making the request.

SECTION 26. OATHS OF THE ARBITRATORS AND WITNESSES

Prior to the commencement of the first session, an oath or affirmation shall be administered to the arbitrator(s). All testimony shall be under oath or affirmation.

SECTION 27. AMENDMENTS

(a) After the filing of any pleadings, if a party desires to file anew or different pleading, such change must be made in writing and filed with the Director of Arbitration. The Director of Arbitration shall endeavor to serve promptly by mail or otherwise upon all

parties a copy of said change. The other parties may, within ten (10) business days from the receipt of service, file a response with the Director of Arbitration.

(b) After a panel has been appointed, no new or different pleading may be filed except for a responsive pleading as provided for in (a) above or with the panel's consent.

SECTION 28. REOPENING OF HEARINGS

Where permitted by law, the hearings may be reopened by the arbitrators on their own motion or in the discretion of the arbitrators upon application of party at any time before the award is rendered.

SECTION 29. AWARDS

(a) All awards shall be in writing and signed by a majority of the arbitrators or in such manner as is required by law. Such awards may be entered as a judgment in any court of competent jurisdiction.

(b) Unless the law directs otherwise, all awards rendered pursuant to this Code shall be deemed final and not subject to review or appeal.

(c) The Director of Arbitration shall endeavor to serve a copy of the award: (i) by registered or certified mail upon all parties, or their counsel, at the address of record; or, (ii) by personally serving the award upon the parties; or, (iii) by filing or delivering the award in such a manner as may be authorized by law.

(d) The arbitrator(s) shall endeavor to render an award within thirty (30) business days from the date the record is closed.

SECTION 30. MISCELLANEOUS

This Code shall be deemed a part of and incorporated by reference in every duly-executed Submission Agreement which shall be binding on all parties.

SECTION 31. SCHEDULE OF FEES

(a) At the time of filing a Submission Agreement, a Claimant shall deposit with the (name of self-regulatory organization) the amount indicated below unless such deposit is specifically waived by the Director of Arbitration.

Amount in Dispute (Exclusive of interest and expenses)	*Amount of Deposit*
$1,000 or less	$15
Above $1,000 but not exceeding $2,500	$25
Above $2,500 but not exceeding $5,000	$100
Above $5,000 but not exceeding $10,000	$200
Above $10,000 but not exceeding $50,000	$400
Above $50,000 but not exceeding $100,000	$500
Above $100,000 but not exceeding $500,000	$750
Above $500,000	$1,000

Where the amount in dispute is $10,000 or less, no additional deposits shall be required despite the number of sessions. Where the amount in dispute is above $10,000 and multiple sessions are required, the arbitrators may require any of the parties to make additional deposits for each additional session. In no event shall the aggregate amount deposited per session exceed the amount of the initial deposit as set forth in the above schedule.

(b) The arbitrators, in their awards, may determine the amount chargeable to the parties as forum fees (fees) and shall determine by whom such fees shall be borne. Where the amount in dispute is $10,000 or less, total fees to the parties shall not exceed the amount deposited. Where the amount in dispute is above $10,000 but does not exceed $50,000, the

maximum fee shall be $300 per session. Where the amount in dispute is above $50,000 but does not exceed $100,000, the maximum fee shall be $500 per session. Where the amount in dispute is above $100,000 but does not exceed $500,000, the maximum fee shall be $750 per session. Where the amount in dispute is above $500,000, the maximum fee shall be $1,000 per session. Amounts deposited by a party shall be applied against fees, if any. If the fees are not assessed against a party who had made a deposit, the deposit will be refunded.

(c) If the dispute, claim or controversy does not involve or disclose a money claim, the amount to be deposited by the claimant shall be $100, or such amount as the Director of Arbitration or the panel of arbitrators may require, but shall not exceed $1,000.

(d) Any matter submitted and thereafter settled or withdrawn prior to the commencement of the first session shall entitle the parties to a refund of all but $25 of the amount deposited with the (name of self-regulatory organization).

(e) Any matter submitted and thereafter settled or withdrawn subsequent to the commencement of the first session may be subject to such refund of assessed deposits, if any, as the (name of self-regulatory organization) may determine.

(f) The arbitrators may assess forum fees and Section 21 costs in any matter settled or withdrawn subsequent to the commencement of the first session.

APPENDIX B

Fifth Report of the Securities Industry Conference on Arbitration Statistical Report (April 1986) (Exhibit A)

COMPOSITE ARBITRATION FIGURES

	Total Cases Received	*Total Cases Concluded, Including Settlements*	*Small Claims Received*	*Small Claims Concluded*	*Public Customer Cases Decided*	*Awards in Favor of Public*
1980	830	686	332	269	410	205
1981	1,042	980	306	357	532	264
1982	1,340	1,044	322	292	558	293
1983	1,731	1,259	416	320	622	331
1984	2,449	1,762	561	489	736	366
1985	2,796	2,190	664	520	961	530

AMERICAN STOCK EXCHANGE, INC.

	Total Cases Received	*Total Cases Concluded, Including Settlements*	*Small Claims Received*	*Small Claims Concluded*	*Public Customer Cases Decided*	*Awards in Favor of Public*
1980	45	41	18	11	35	16
1981	39	40	7	11	42	22
1982	37	31	9	4	16	10
1983	41	42	14	8	10	6
1984	69	53	16	14	45	26
1985	64	58	21	14	41	24

Cases carried over into 1986: 29

BOSTON STOCK EXCHANGE, INC.

	Total Cases Received	*Total Cases Concluded, Including Settlements*	*Small Claims Received*	*Small Claims Concluded*	*Public Customer Cases Decided*	*Awards in Favor of Public*
1980	2	2	2	2	2	0
1981	2	2	2	2	0	0
1982	1	1	1	1	1	1
1983	2	2	2	2	2	1
1984	0	0	0	0	0	0
1985	0	0	0	0	0	0

Cases carried over into 1986: 0

CHICAGO BOARD OPTIONS EXCHANGE, INC.

	Total Cases Received	*Total Cases Concluded, Including Settlements*	*Small Claims Received*	*Small Claims Concluded*	*Public Customer Cases Decided*	*Awards in Favor of Public*
1980	44	31	11	11	18	6
1981	41	32	8	8	12	3
1982	50	38	6	6	14	3
1983	75	45	5	4	13	6
1984	91	56	24	16	4	3
1985	64	38	10	5	0	0

Cases carried over into 1986: 26

CINCINNATI STOCK EXCHANGE, INC.

	Total Cases Received	*Total Cases Concluded, Including Settlements*	*Small Claims Received*	*Small Claims Concluded*	*Public Customer Cases Decided*	*Awards in Favor of Public*
1980	0	0	0	0	0	0
1981	0	0	0	0	0	0
1982	0	0	0	0	0	0
1983	0	0	0	0	0	0
1984	0	0	0	0	0	0
1985	0	0	0	0	0	0

Cases carried over into 1986: 0

MIDWEST STOCK EXCHANGE, INC.

	Total Cases Received	*Total Cases Concluded, Including Settlements*	*Small Claims Received*	*Small Claims Concluded*	*Public Customer Cases Decided*	*Awards in Favor of Public*
1980	2	2	1	0	1	1
1981	2	2	0	0	0	0
1982	1	0	0	0	0	0
1983	2	2	0	0	0	0
1984	1	0	0	0	0	0
1985	1	0	0	0	0	0

Cases carried over into 1986: 2

MUNICIPAL SECURITIES RULEMAKING BOARD

	Total Cases Received	*Total Cases Concluded, Including Settlements*	*Small Claims Received*	*Small Claims Concluded*	*Public Customer Cases Decided*	*Awards in Favor of Public*
1980	21	21	7	7	3	2
1981	25	25	5	5	7	4
1982	33	30	7	7	13	6
1983	78	39	17	9	14	5
1984	113	77	20	17	34	21
1985	91	112	31	35	54	31

Cases carried over into 1986: 60

NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.

	Total Cases Received	*Total Cases Concluded, Including Settlements*	*Small Claims Received*	*Small Claims Concluded*	*Public Customer Cases Decided*	*Awards in Favor of Public*
1980	318	234	134	113	122	56
1981	422	422	142	177	242	118
1982	606	435	157	139	276	140
1983	768	549	216	147	272	161
1984	1,108	747	298	244	381	196
1985	1,400	962	377	250	434	232

Cases carried over into 1986: 1,452

NEW YORK STOCK EXCHANGE, INC.

	Total Cases Received	*Total Cases Concluded, Including Settlements*	*Small Claims Received*	*Small Claims Concluded*	*Public Customer Cases Decided*	*Awards in Favor of Public*
1980	367	327	131	110	221	119
1981	477	433	117	134	214	111
1982	558	473	109	113	214	118
1983	713	532	136	122	276	137
1984	1,008	796	176	183	259	113
1985	1,095	962	198	190	424	221

Cases carried over into 1986: 831

PACIFIC STOCK EXCHANGE, INC.

	Total Cases Received	*Total Cases Concluded, Including Settlements*	*Small Claims Received*	*Small Claims Concluded*	*Public Customer Cases Decided*	*Awards in Favor of Public*
1980	24	28	12	11	4	3
1981	24	20	17	17	9	5
1982	31	21	15	11	10	7
1983	35	29	17	17	23	10
1984	45	26	21	11	10	7
1985	50	40	12	18	20	12

Cases carried over into 1986: 54

PHILADELPHIA STOCK EXCHANGE, INC.

	Total Cases Received	*Total Cases Concluded, Including Settlements*	*Small Claims Received*	*Small Claims Concluded*	*Public Customer Cases Decided*	*Awards in Favor of Public*
1980	7	0	16	4	4	2
1981	10	6	6	3	6	1
1982	23	15	18	11	14	8
1983	17	19	9	11	12	5
1984	14	7	6	4	3	0
1985	31	18	15	8	8	2

Cases carried over into 1986: 14

APPENDIX C

Table 19
U.S. District Court
Civil Cases Commenced by Nature of Suit
During the Twelve Month Periods Ended June 30, 1981 through 1985

Nature of Suit	*1981*	*1982*	*1983*	*1984*	*1985*	*Percent Change 1985/ 1984*
Total	180,576	206,193	241,842	261,485	273,670	4.7
Contracts	51,159	67,276	84,017	88,231	102,642	16.3
Insurance	4,234	5,324	6,184	6,211	6,851	10.3
Marine	5,143	5,552	5,721	5,031	5,037	0.1
Miller Act	754	866	1,168	1,283	1,623	26.5
Negotiable Instruments	4,072	3,332	3,987	5,292	4,122	−22.1
Recovery of Overpayments and Enforcement of Judgments	18,161	30,048	41,213	46,190	58,160	25.9
Other	19,535	21,499	24,439	24,756	26,849	8.5
Real Property Actions	8,887	8,812	9,667	9,192	10,118	10.1
Mortgage Foreclosure	4,725	5,754	6,382	6,660	7,465	12.1
Land Condemnation	2,179	1,055	985	508	670	31.9
Other	1,983	2,003	2,300	2,024	1,983	−2.0
Tort Actions	33,767	34,218	36,484	37,522	41,593	10.8

Nature of Suit	*1981*	*1982*	*1983*	*1984*	*1985*	*Percent Change 1985/ 1984*
Employers' Liability Act	1,876	2,017	2,102	1,914	2,221	16.0
Airplane	545	589	792	748	613	−18.0
Marine	5,166	5,272	4,829	4,455	4,367	−2.0
Motor Vehicle	5,708	6,095	6,413	6,502	6,776	4.2
Other Personal Injury	7,997	8,253	9,990	10,177	11,076	8.8
Personal Injury Product Liability	8,028	7,908	8,026	9,677	12,507	29.2
Property Damage	4,447	4,084	4,332	4,049	4,033	−0.4
Actions Under Statutes	86,172	95,294	111,100	125,953	118,833	−5.7
Antitrust	1,352	1,066	1,213	1,124	1,082	−3.7
Bankruptcy Suits	1,985	2,340	3,775	4,645	6,331	36.3
Civil Rights:						
Accommodations	336	237	296	291	253	−13.1
Employment	6,245	7,689	9,097	9,748	8,082	−17.1
Voting	152	170	175	259	281	8.5
Welfare	253	215	229	183	180	−1.6
Other Civil Rights	8,433	8,727	9,938	10,738	10,757	0.2
Commerce (ICC rates, etc.)	1,080	1,057	1,043	1,000	912	−8.8
Deportation	113	134	141	193	185	−4.1
Economic Stabilization Act	47	27	42	24	22	−8.3
Energy Allocation Act	104	47	35	41	34	−17.1

Nature of Suit	*1981*	*1982*	*1983*	*1984*	*1985*	*Percent Change 1985/ 1984*
Environmental Matters	582	394	465	671	652	−2.8
Forfeiture and Penalty Suits	2,963	3,340	3,463	3,708	4,908	32.4
Freedom of Information Act	507	381	454	479	565	18.0
Labor Laws	9,300	10,227	11,033	11,821	11,749	−0.6
Patent, Copyright, Trademark	4,027	4,592	5,413	5,298	5,412	2.2
Prisoner Petitions:						
Federal	4,104	4,328	4,354	4,526	6,262	38.4
State	23,607	24,975	26,421	26,581	27,206	2.4
Securities, Commodities and Exchange	1,768	2,376	2,915	3,142	3,266	3.9
Social Security Laws	9,780	12,812	20,315	29,985	19,771	−34.1
Tax Suits	3,930	4,234	4,187	3,862	3,006	−22.2
Other	5,504	5,926	6,096	7,634	7,917	3.7
Other Actions	591	593	574	587	484	−17.5
Domestic Relations (Local Jurisdiction	12	5	5	—	5	—
Insanity (Local Jurisdiction)	135	113	162	94	—	—
Other	444	475	407	493	479	−2.8